

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division**

TERRY S. EVERSOLE,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 3:11CV00428
)	Jury Demanded
FORD MOTOR COMPANY)	
)	
and)	
)	
CATERPILLAR, INC.,)	
)	
Defendants.)	

**PLAINTIFF’S RESPONSE TO DEFENDANT CATERPILLAR’S MOTION
FOR SUMMARY JUDGMENT**

In response to Defendant Caterpillar’s Motion for Summary Judgment, Plaintiff, through counsel, states:

Defendant Caterpillar’s Motion for Summary Judgment misstates one critical fact: Plaintiff’s Complaint does not merely state a claim against Caterpillar for violation of the Magnuson-Moss Warranty Act, but also for breach of express and implied warranties. See paragraphs 1 and 27 of the Civil Complaint.

While Plaintiff may be forced, after the presentation of evidence, to concede that the truck at issue is not a “consumer product” under the Magnuson-Moss Warranty Act, and thereby lose the unique protections of that Act, that does not resolve the issue of breach of express and implied warranties which was pled in the Complaint. If the combination of these claims as

Count One of the Complaint was confusing, Plaintiff requests leave to amend the Complaint.

Still, the question of whether the type of truck at issue in this matter is “normally used for personal, family, or household matters” is a question of fact that requires examination. The Federal Trade Commission, charged with prescribing rules under the Act, has defined the products covered in some detail at 16 C.F.R. 700.1(a):

[A] product is a “consumer product” if the use of that type of product is not uncommon. The percentage of sales or the use to which a product is put by an individual is not determinative. For example, products such as automobiles and typewriters which are used for both personal and commercial purposes come within the definition of consumer product. Where it is unclear whether a particular product is covered under the definition of consumer product, any ambiguity will be resolved in favor of coverage.

Further, it is Defendant Ford's argument to make that this type of truck is not a consumer product. Defendant Caterpillar warrants the engine to this vehicle, and makes no claim in its Motion for Summary Judgment that the engine is of a type that is not used for personal, family, or household use. The Complaint clearly charges that Caterpillar has breached its express and implied warranties as to the engine and any other parts it warrants, so even a finding that this type of truck is not a "consumer product" does not relieve Caterpillar of its obligations regarding the engine.

Therefore, Plaintiff prays that the Court deny the Motion for Summary Judgment.

TERRY S. EVERSOLE

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 2012, a Saturday, I will electronically file this Statement with the Clerk of the Court using the CM/ECF system which will send notification of the filing to the following:

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